IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

NO. 540

JOSEPH W. BOTTONE, *Petitioner,*

v.

HENRY S. LINDSLEY, BENJAMIN C. HILLIARD, JR., MORTON M. DAVID, IRA L. QUIAT, and FREDERICK E. DICKERSON, *Respondents.*

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

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OPINION BELOW.

The opinion of the United States Circuit Court of Appeals for the Tenth Circuit (R. 43-46), is reported at 170 F. (2d) 705.

JURISDICTION.

The United States Circuit Court of Appeals on November 5, 1948, affirmed an order of the District Court of the United States for the District of Colorado, entered January 9, 1948, dismissing a complaint of the petitioner. The

petition for a writ of certiorari was filed on February 2, 1949. The petitioner invoked the jurisdiction of this Court under Section 240(a) of the Judicial Code, as amended by the Act of February 23, 1925 (now 28 U.S.C. 1254).

QUESTION PRESENTED.

Whether a party in a litigation in a state court whose claim has been passed upon adversely to him, both upon trial and upon appeal to the highest court of the state, and who has not attempted to appeal to the United States Supreme Court to vindicate his alleged constitutional rights, may thereafter invoke the Civil Rights statute to justify an original suit in the federal district court to contend that he has been deprived of his property without due process of law.

STATUTE INVOLVED.

The petitioner here relies upon the Act approved April 20 1871, Chapter 22, Section 1, 17 Stat. 3 (8 U.S.C. 43), which provides:

> "§ 43. *Civil action for deprivation of rights.*
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R.S. § 1979"

STATEMENT.

The present brief is filed primarily because of the lack of an adequate statement of the case in the petition for a writ of certiorari.

The petitioner had been appointed by the County Court of the City and County of Denver, Colorado (the probate

court), as administrator of the estate of his late mother (R. 8). The administration was as though there were no will (R. 6). The petitioner continued as adminstrator for twenty months, during which time his mother's will was not presented for probate (R. 6, 8). With ths disclosure of the will, the County Court removed him from his office as administrator, and after admitting the will to probate, appointed the respondent, Hilliard, as administrator (R. 6, 7). The probate proceedings are still pending in the County Court (R. 41).

During the pendency of the probate proceedings, the petitioner disclosed and filed in the County Court a purported trust agreement, the text of which gave him certain interest in th estate (R. 10, 11, 41).

The petitioner alleges that a petition was filed in the County Court on his behalf to determine the validity or or effect of the trust agreement, but that he has not been able to obtain a hearing date (R. 41).

Independently of the probate proceedings, the petitioner commenced a suit in the District Court of the City and County of Denver (the court of general jurisdiction), against the respondent, Hilliard, as administrator, *c. t. a.*, to enforce the purported trust agreement (R. 2, ff.). An answer was filed to this suit. The answer contained a cross-complaint, alleging that the plaintiff was indebted to the estate in the sum of $2,200 (R. 13-50).

A replication was filed in connection with which the petitioner demanded a jury trial (R. 15-16). On oral argument, the District Court held that the petitioner was not entitled to a jury trial (R. 19).

On the issues thus joined, trial was held before the Court. Findings of fact and conclusions of law were entered in favor of the respondent, Hilliard, and giving him as administrator, *c. t. a.*, judgment against the petitioner in the amount of $2,000 (R. 16-18).

The appellant then sued out his appeal to the Supreme Court of the State of Colorado, which court in due course

confirmed the judgment of District Court, but without written opinion, *Bottone* v. *Cattany*, 115 Colorado 452, 174 Pacific (2d) 952.

The petitioner then instituted suit in the United States District Court. His suit named as defendants the judge of the State District Court, the administrator, the attorneys for the defendants in the State District Court, and his own attorney who had represented him in the State District Court. These constitute the present respondents. The burden of the petitioner's complaint was that he had been deprived of due process of law in being denied a jury trial, that the judgment was entered without regard to the evidence, that the respondent, Hilliard, was illegally acting as administrator, that the cross-complaint was defective, that the State District Court did not have jurisdiction, and, generally, that there was a conspiracy and a collusion to deprive the petitioner of his rights. He set up his damages as amounting to $110,000 (R. 1-6).

The respondents filed a motion to dismiss upon the ground that the complaint did not state facts sufficient to sustain the suit (R. 19). Oral argument was had upon the motion to dismiss (R. 2-42), after which the United States District Court sustained the motion to dismiss. The petitioner stood upon his motion and did not plead over (R. 20, 41).

The petitioner sued out his appeal to the United States Circuit Court of Appeals for the Tenth Circuit, which affirmed.

ARGUMENT.

1. Contrary to the contention of the petitioner's brief (p. 14), the decision of the Court below is not in conflict with any ruling of another circuit or with any ruling of this Court. *Picking* v. *Pennsylvania R. Co.*, 151 F. (2d) 240, holds (p. 249), that " . . . Congress gave a right of action sounding in tort to every individual whose federal rights were trespassed upon by any state officer acting

under pretense of state law". This principle was not rejected, but was, rather, relied upon by the Court below. (It is worthy of note that the *Picking* case holds [p. 254], that mere general accusations of taking part in a general conspiracy are not sufficient to state a cause of action.) *Polk* v. *Glover*, 305 U.S. 5, 83 L. Ed. 6, decided that under the particular circumstances of that case the plaintiffs were entitled to have a trial because the truth or falsity of the facts alleged in the complaint should have been established before the court undertook to pass upon grave constitutional questions. In the present case no serious constitutional questions were raised. The ruling of the Court below recognized the plaintiff's constitutional theories, but held that a cause of action had not been pleaded thereunder. *Hague* v. *Congress for Industrial Organization*, 307 U.S. 496, 83 L. Ed. 1423, was decided after a trial and on the basis of findings and conclusions. It was a case where the defendants had been "acting under a city ordinance". There is nothing in the Hague case inconsistent with the rulings of the Court below.

2. The petitioner's claim that the District Court of the state was without jurisdiction is entirely without merit because (a) he, himself, selected that forum for his suit and (b) by the petitioner's own statement (R. 41), the County Court, which he now claims to be the proper court, still has his claim under consideration and has not ruled upon it.

3. The refusal of the State District Court to accord the petitioner a jury trial upon the respondents' cross-complaint is of no significance here. Under the settled law of Colorado, the character of a suit as being either at law or in equity, for purposes of right to jury trial, is determined by the complaint, not by the cross-complaint. *Tiger Company* v. *Fisher*, 98 Colo. 221, 223, 54 Pacific (2d) 891. More importantly, the right to a jury trial in a state court does not come within the protection of the Fourteenth Amendment. *Wagner Electric Company* v. *Lyndon*, 262 U.S. 226,

67 L. Ed. 961, *New York Central Railroad Company* v. *White,* 243 U.S. 188, 61 L. Ed. 667, *Walker* v. *Sauvenit,* 92 U.S. 9, 23 L. Ed. 678.

4. The petitioner, if he had any rights under the Constitution of the United States, should have raised them by appeal to this Court after the adverse decision of the Supreme Court of the State of Colorado, when he could have raised all of the questions sought to be raised in the present suit. Cf. *Angel* v. *Bullington,* 330 U.S. 193, 91 L. Ed. 832. This, in fact, is the principal ground relied upon in the decision of the Court below, which said:

> "It is shown upon the face of this complaint that the appellant regularly invoked the jurisdiction of the State Court, the case was tried, judgment was rendered, appealed to and confirmed by the Supreme Court of Colorado (Bottone v. Cattany, 174 P. 2d 952). Without more, it is clear that the appellant was not denied due process of law or the equal protection of the law, cognizable under the Civil Rights Act."

CONCLUSION.

The decision below is correct and no novel question of importance is presented. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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